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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

This Document Relates To:

AT&T Mobility LLC, et al. v. AU Optronics Corporation, et al., Case No. 09-cv-04997 SI

Best Buy Co., Inc., et al. v. AU Optronics Corporation, et al., Case No. 10-cv-04572 SI

Electrograph Systems, Inc., et al. v. Epson Imaging Devices Corporation, et al., Case No. 10-cv-00117 SI

Target Corp., et al. v. AU Optronics Corporation, et al., Case No. 10-cv-04945 SI

Costco Wholesale Corporation v. AU Optronics Corporation, et al., Case No. 11-cv-00058 SI

Case No. 3:09-cv-04997; 3:10-cv-04572 SI; 3:10-cv-00117 SI; 3:10-cv-04945 SI; 3:11-cv-00058 SI

Case No. M 07-md-01827 SI

MDL No. 1827

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT FOR LACK OF STANDING UNDER *ILLINOIS BRICK* AND *IN RE ATM FEE*

Date: October 3, 2012
Time: 9:00 a.m.
Courtroom: 10
Judge: Honorable Susan Y. Illston

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on October 3, 2012 at 9:00 a.m. in Courtroom 10, 19th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Susan Illston, defendants reflected in the signature block below ("Defendants"), will and hereby do move the Court under Federal Rule of Civil Procedure 56 for an order granting partial summary judgment in favor of Defendants as to "Plaintiffs" (defined to include Target Corp., Sears, Roebuck and Co., Kmart Corp., Old Comp, Inc., Good Guys, Inc., RadioShack Corp., and Newegg, Inc. (collectively, "Target"); Best Buy Co., Inc., Best Buy Purchasing LLC, Best Buy Stores, L.P., Best Buy China Ltd., and Magnolia Hi-Fi, Inc. ("Best Buy"); Electrograph Systems, Inc. and Electrograph Technologies Corp. ("Electrograph"); AT&T Mobility LLC, AT&T Corp., AT&T Services, Inc., Bellsouth Telecommunications, Inc., Pacific Bell Telephone Company, AT&T Operations, Inc., AT&T Datacomm, Inc., and Southwestern Bell Telephone Company (collectively, "AT&T"); and Costco Wholesale Corporation ("Costco")) regarding Plaintiffs' Clayton Act claims based on purchases of finished products.

Specifically, Defendants seek an order precluding each Plaintiff from asserting claims under the Clayton Act based on their finished product purchases. As to those purchases, Plaintiffs are "indirect" purchasers, and Plaintiffs lack evidence suggesting they fall within one of the three narrow exceptions to the "direct purchaser rule" announced in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *See In re ATM Fee Litigation*, 2012 WL 2855813, --- F.3d ---, (9th Cir. July 12, 2002). Plaintiffs therefore lack standing to assert claims under the Sherman and Clayton Acts for purchases of finished products, and judgment should be entered as to those claims.

This motion is based on this Notice of Motion and Motion; the following Memorandum of Points and Authorities; any reply memorandum as may be filed; the accompanying Declaration of Lee F. Berger; the Declaration of Gregory Weingart; the arguments of counsel; and such other material as the Court may consider.

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Under the "direct purchaser rule" announced by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and as recently analyzed in *In re ATM Fee Litigation*, 2012 WL 2855813, --- F.3d ---, (9th Cir. July 12, 2002), do Plaintiffs lack standing to pursue claims under the Sherman and Clayton Acts when they did not purchase allegedly price-fixed LCD panels but instead purchased finished products, some of which allegedly included such panels?

RELEVANT PRIOR ORDERS

Date	MDL Dkt. No.	Order and Holding
Mar. 3, 2009	873	*Order Denying Tatung Company of America's Motion to Dismiss Direct Purchaser Plaintiffs' First Amended Complaint* (Court held that Tatung Company of America had not shown that it was not a proper defendant under *Royal Printing* and *Freeman*, but could renew its arguments upon a fuller factual record.)
Mar. 28, 2010	1641	*Order Granting in Part and Denying in Part Direct Purchaser Plaintiffs' Motion for Class Certification; Granting Defendants' Motion to Strike Untimely Declarations* (Court held that *Illinois Brick* arguments against purchasers of finished products did not defeat the typicality requirement for class certification.)
Mar. 28, 2010	1643	*Order Denying Tatung Company of America's Motion for Leave to File a Motion for Reconsideration of March 3, 2009 Order Denying Motion to Dismiss* (Court reaffirmed prior holding that Tatung Company of America was a proper defendant under *Royal Printing* and *Freeman*.)
Nov. 7, 2011	4108	*Order Denying Toshiba Entities' Motion for Partial Summary Judgment Under* Illinois Brick (Court held that *Royal Printing* exception applied to direct purchasers.)
June 27, 2012	6028	*DPP Jury Instructions*, at 3 (Court defined Finished Products Class as plaintiffs who purchased finished products directly from Toshiba, one of its alleged co-conspirators, or one of their subsidiaries or affiliates.)
June 28, 2012	N/A	*DPP Trial Transcript*, at 3576:2-4 (Court denied Toshiba's request for verdict form requiring ownership or control to establish *Royal Printing* exception.)

I. INTRODUCTION

The impact of the Ninth Circuit's decision last week in *In re ATM Fee Antitrust Litigation*, ---F.3d ---, 2012 WL 2855813 (9th Cir. July 12, 2012) is both significant and immediate. In particular, the *In re ATM Fee* decision confirmed that a plaintiff who does not purchase and pay for the specific product or service whose price is fixed by agreement is not a "direct purchaser" within the meaning of the Clayton Act and lacks standing to sue unless one of three "limited" exceptions apply—the cost-plus exception, the co-conspirator exception, or the "ownership or control" exception. *Id.* at *6. Applying the Supreme Court's admonition in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 (1990), the Ninth Circuit refused to recognize new exceptions to the *Illinois Brick* rule and held that existing exceptions should be given narrow readings. *Id.* at *13.

In holding that the only plaintiffs with Clayton Act standing were those who paid the fixed price "(and not an upstream price that was then passed on)," *id.* at *12, the Ninth Circuit expressly disagreed with this Court's previous broader construction of the co-conspirator exception to allow suit based on finished product purchases despite alleging only a panel conspiracy. *Id.* at *12 n.7. The Ninth Circuit stated that it "would have to extend our current co-conspirator exception" to accept that argument, noted that other courts, including this Court in this case, have done so, but stated that "*we decline to do so*." *Id.* at *12 (emphasis added). The Ninth Circuit's refusal to expand the *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980) exception beyond purchases from a direct purchaser owned or controlled by a co-conspirator is also at odds with this Court's more lenient application of the *Royal Printing* exception in these cases to include non-parental affiliation. *E.g.*, D.I. 666; D.I. 1641.

In these cases, the product allegedly price-fixed is the LCD *panel*. Yet, these Plaintiffs seek to bring "direct" federal claims, based on the purchase of a finished *product*, not a panel. Even if panel prices were fixed with the expectation and intent that higher prices for finished products would result, that is not enough, under the square holding of *In re ATM Fee*, to give antitrust standing to anyone who purchases finished products from a member of the conspiracy. *In re ATM Fee*, therefore, mandates the dismissal of much, if not all, of the Clayton Act claims

Plaintiffs pursue as purported "direct" purchasers. Specifically:

- The Court should dismiss Plaintiffs' Clayton Act claims based on Plaintiffs' purchases (even from alleged conspirators) of finished products containing panels not manufactured by an alleged conspirator because those were not direct purchases of a price-fixed product;
- The Court should dismiss Plaintiffs' Clayton Act claims based on Plaintiffs' purchases of finished products from companies that are not owned and controlled by an alleged conspirator;
- The Court should dismiss Plaintiffs' Clayton Act claims based on Plaintiffs' purchases of finished products made by an alleged conspirator where the finished product contains a panel made by a different alleged conspirator because the latter does not own or control the former; and
- As a corollary of the foregoing, the Court should dismiss Plaintiffs' Clayton Act claims as to each purchase of a finished product for which a Plaintiff cannot identify the panel manufacturer.

II. THE NINTH CIRCUIT'S DECISION IN *IN RE ATM FEE LITIGATION*

The impetus for this motion is the Ninth Circuit's July 12, 2012 decision in *In re ATM Fee Litigation*. In *In re ATM Fee*, plaintiff bank cardholders brought suit against bank defendants and an automated teller machine ("ATM") network, alleging that the defendants had illegally conspired to fix the price of one of four fees involved in a "foreign ATM" transaction. *In re ATM Fee*, 2012 WL 2855813, at *1. The district court granted summary judgment for the defendants on the ground that the plaintiffs lacked antitrust standing, and the Ninth Circuit affirmed.

"A 'foreign ATM transaction' occurs when ATM cardholders withdraw money from their bank account using an ATM not owned by their bank (which issued them the card)." *Id.* at *1. The transaction involves four parties: (1) the cardholder; (2) the card-issuing bank; (3) the entity that owns the ATM Machine; and (4) the ATM network, i.e., the entity that connects the ATM owners with card-issuing banks. *Id.* at *1. Plaintiffs in *In re ATM Fee* were cardholders. Defendants were both the owner of the STAR ATM network and certain banks that both owned

ATM machines and issued ATM cards. *Id.*

Plaintiffs' theory was that the defendant banks (who were members of the STAR network) and STAR itself conspired to set the "interchange fee," which is one of the four fees an ATM transaction triggers. *Id.* at *2. The four fees are: (1) the "surcharge," paid from the cardholder to the owner of the ATM; (2) the "foreign ATM fee," paid from the cardholder to the card-issuing bank; (3) the "switch fee," paid from the card-issuing bank to the ATM network; and (4) the "interchange fee," paid from the card-issuing bank to the ATM owner. *Id.* Only two of the fees were relevant to the case. Plaintiffs alleged that defendants and STAR conspired to set the "interchange" fee, which was in turn passed on to them as part of the "foreign ATM fee." *Id.* at *2, *6 ("In other words, the Bank Defendants pass on the cost of the interchange fees through the foreign ATM fees.").

Plaintiffs sought to proceed under federal law, arguing that they could proceed as "direct purchasers" despite the fact that they never paid the price-fixed "interchange fee." *Id.* Similar to Plaintiffs here, they argued that they had standing because they "'purchased directly from price-fixing Defendants'" which "conspired to fix interchange fees for the purpose and effect of fixing foreign ATM fees." *Id.* at *9, 12. The Ninth Circuit disagreed.

The Ninth Circuit explained that the "'Supreme Court has interpreted [§ 4 of the Clayton Act]" "'narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits.'" *Id.* at *5 (quoting *Del. Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1119 (9th Cir. 2008)). Under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Ninth Circuit reasoned that "indirect purchasers may not use a pass-on theory to recover damages [under federal laws] and thus have no standing to sue." *Id.* Noting that the "Supreme Court has expressed reluctance in carving exceptions to the *Illinois Brick* rule[,]" the Ninth Circuit nonetheless recognized that "limited exceptions do exist." *Id.*[1] The Court

[1] The Ninth Circuit explained that the Supreme Court has strictly policed exceptions to *Illinois Brick*. *In re ATM Fee*, 2012 WL 2855813 at *13; *see also Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 ("The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to carve out exceptions to the [direct purchaser] rule for particular types of markets.") (quotations omitted). Others in this district have agreed and emphasized that *Illinois* (continued)

identified only three: (1) "an exception for indirect purchasers when a pre-existing cost-plus contract with the direct purchaser exists[;]" (2) a co-conspirator exception; and (3) an exception where "customers of the direct purchaser either own or control the direct purchaser," "or when a conspiring seller owns or controls the direct purchaser[.]" *Id.* at *6.

In re ATM Fee centered on the scope of these three exceptions and whether plaintiffs could (or had) properly invoked any of them. The Court walked through a four-part analysis, and it is that analysis that shapes this motion and impacts the claims asserted by Plaintiffs:

- **Cardholders Were Indirect Purchasers Because They Did Not Directly Pay the Interchange Fee.**

First, the Ninth Circuit held that plaintiff cardholders were indirect purchasers. "The district court found plaintiffs to be indirect purchasers, because they do not directly pay the fixed interchange fee," and the Ninth Circuit agreed. *Id.* at *6.

- **Cardholders Did Not Invoke the Cost-Plus Exception.**

Second, the Ninth Circuit observed that the plaintiffs did not allege that they had pre-existing cost-plus contracts with the defendant banks and therefore the cost-plus contract exception did not apply. *Id.* at *6.

- **Cardholders Could Not Invoke the Co-Conspirator Exception Because They Could Not Show the Price They Paid Was Set by the Conspiracy.**

Third, the Ninth Circuit agreed that the plaintiffs could not invoke the co-conspirator exception, because "under the co-conspirator exception recognized in this circuit, the price paid

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Brick must be strictly enforced. For example, Judge Legge, sitting as Special Master in the *In re Cathode Ray Tube (CRT) Antitrust Litigation*, Case No. CV–07–5944–SC (N.D. Cal. May 31, 2012), recently issued a report where he explained: "One must conclude that *Illinois Brick* is still the law and the policy of the United States Supreme Court, and that it is a bright line rule. It applies even if otherwise meritorious claims are barred by the 'direct purchasers only' rule." *Id.* at Docket No. 1221 ("Report and Recommendation Regarding Defendants Joint Motion for Summary Judgment") at *8 (rejecting as impermissible claims based on indirect purchases of finished goods such as those here); s*ee also Del. Valley Surgical Supply*, 523 F.3d at1120-21 (the "direct purchaser rule" is a bright line rule). Consistent with these admonitions, the Ninth Circuit in *In re ATM Fee* repeatedly counsels that the few recognized exceptions should be given a narrow construction. *See* 2012 WL 2855813, at *1, *5, *6, *9, and *13.

by a plaintiff must be set by the conspiracy and *not merely affected by the setting of another price*," and plaintiffs had no evidence to meet that standard. *Id.* at *11 (emphasis added).

The Court explained that "[t]he ATM Network (not the card-issuing bank, nor the ATM owners) establishes the interchange fee. Individual card-issuing banks set their own ATM fees." *Id.* at *1. Plaintiffs argued that "conspiring to set a price for the purpose and effect of raising the price at issue equates to fixing that price and makes the payers of the raised price direct purchasers." *Id.* at *10. Plaintiffs cited *Freeman San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003), where the plaintiffs paid fees to Sandicor, a Multiple Listing Service ("MLS"), and Sandicor in turn paid (allegedly fixed) "support fees" to realtor associations that were its shareholders. The Ninth Circuit again rejected plaintiffs' position: "Standing existed in *Freeman*, not because the association fixed the support fees for the purpose and effect of raising MLS fees, but because of the associations' ownership and control of Sandicor (the direct purchaser)." 2012 WL 2855813 at *11. "Here, unlike *Freeman*, the Bank Defendants independently set the fee paid by Plaintiff (*i.e.*, the foreign ATM fee) and the amount of such fees varies between Bank Defendants." *Id.* at *12. The Ninth Circuit held that the plaintiffs' theory "contradicts *Illinois Brick*, because *Illinois Brick* rejected exceptions for markups by middlemen or when the price-fixed good is a vital input to a larger product." *Id.* at *10.

In this connection, the Ninth Circuit respectfully disagreed with the reasoning of an order in this *TFT-LCD* litigation (this Court's March 28, 2010 order certifying a direct purchaser product class). The *In re ATM Fee* plaintiffs cited that decision asking that the Court of Appeal extend the co-conspirator exception to them because they had purchased banking services from, and paid the foreign ATM fee directly to, the Bank Defendants that allegedly fixed the different interchange fee. *Id.* Recognizing that this Court had adopted similar reasoning in holding that "consumers of the final [LCD] products are direct purchasers because they 'purchased from the alleged violator[,]'" *id.* at *12 n.7, the Ninth Circuit "decline[d] to do so." *Id.* at *12.[2] The Ninth

[2] The Ninth Circuit also distinguished or criticized two decisions on which this Court had relied, *In re Sugar Indus. Antitrust Litigation.*, 570 F.2d 13 (3d Cir. 1978) and *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002). *Id.* at *12 n.7.

Circuit instead explained that it "*recognize[s] the co-conspirator exception only when the conspiracy involves setting the price paid by the plaintiffs*." *Id.* (emphasis added).[3]

- **Cardholders Could Not Invoke the Ownership and Control Exception Because They Could Not Show a Conspiracy Participant Directly Owned the Actual Direct Purchaser.**

Finally, the Ninth Circuit held that the plaintiffs could not invoke the "ownership and control" exception. Under *Royal Printing*, this exception allows an indirect purchaser to sue only "where a conspiracy seller owns or controls the direct purchaser." *Id.* at *6.

Plaintiffs argued that they fell within the *Royal Printing* exception as supposedly expanded by *Freeman* because (they claimed) there was no realistic possibility that the defendant banks (members of STAR) would sue STAR or their co-conspirator banks. *Id.* at *13. In some instances, that would require a co-conspirator (a bank that paid the interchange fee to the ATM owner) to sue another co-conspirator (who owned the ATM Machine). Citing to language in *Freeman* that "'[i]ndirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation[,]" plaintiffs argued they had standing. *Id.* at *13 (quoting *Freeman*, 322 F.3d at 1145-46). The Ninth Circuit again disagreed.

The Court explained that the quoted *Freeman* language did not displace the narrow ownership or control test, because "*Freeman* relied on ownership and control to find standing"—namely that "the co-conspiring realtor associations owned and controlled Sandicor (the direct purchaser) and had the power to appoint Sandicor's board of directors." *Id.* "Therefore," the Court explained, "*Freeman* outlines that whether a realistic possibility of suit exists, depends on the existence of [such] ownership and control between the direct purchaser and the seller." *Id.* The Court then "decline[d] to extend the exception noted in *Royal Printing* and *Freeman* to situations where the seller does not own or control the direct purchasers, because, after *Royal Printing*, the Supreme Court stated that '[t]he possibility of allowing an exception, even in rather

[3] In this regard the Ninth Circuit acknowledged that "this co-conspirator exception is not really an exception at all." *In re ATM Fee*, 2012 WL 2855813 at *7.

meritorious circumstances, would undermine the rule.'" *Id.* (quoting *UtiliCorp*, 497 U.S. at 216).

Applying this rule under summary judgment standards, the Ninth Circuit held that plaintiffs lacked standing because "[p]laintiffs do not allege that STAR owns or controls Bank Defendants or that Bank Defendants own or control other Bank Defendants." *Id.* at 13*; see also id.* at 14, n.10 ("As for the time period from July 2, 2000, to February 1, 2001 [the time prior to STAR's public ownership], there are no allegations that Bank Defendants controlled one another or conspired to fix foreign ATM fees. As such, the concern in *Royal Printing* of a controlling party prohibiting the direct purchaser from suing is not present here.").

As explained below, each of these holdings applies with full force to preclude Plaintiffs' federal claims as purported direct purchasers of finished goods.

III. BACKGROUND

For the Plaintiffs at issue in this motion, the undisputed relevant facts mirror the facts in *In re ATM Fee*. As in *In re ATM Fee*, these Plaintiffs do not allege they purchased the price-fixed product (an LCD panel). As in *In re ATM Fee*, these Plaintiffs admit that they do not allege a conspiracy to fix the price of what they actually purchased (an LCD finished product). As in *In re ATM Fee*, these Plaintiffs have no evidence that the direct purchasers from which Plaintiffs themselves purchased were owned or controlled by alleged conspiracy members. Unlike in *In re ATM Fee*, but equally relevant because of it, many of the purported "direct purchasers" from which plaintiffs bought are not even themselves direct purchasers. Unlike in *In re ATM Fee*, but equally relevant because of it, these Plaintiffs lack evidence as to who manufactured the panels later combined into the LCD finished products they ultimately purchased.

1. These Plaintiffs Seek To Pursue Clayton Act Claims for Purchases of LCD Finished Products.

Defendants bring this motion against the AT&T, Best Buy, Costco, Electrograph, and Target Plaintiffs' Sherman and Clayton Act claims. All of these Plaintiffs base their claims on purchases of finished products such as televisions and mobile phones containing LCD panels. None of these Plaintiffs (in contrast to other plaintiffs in this MDL, such as Dell and HP) base

their claims on direct purchases of allegedly price-fixed LCD panels.[4] Plaintiff Electrograph was a distributor that purchased LCD finished products for resale primarily to resellers and system integrators.[5] Plaintiffs Best Buy, Costco, CompUSA, Good Guys, Kmart, Newegg, RadioShack, Sears, and Target were retailers that purchased LCD finished products for resale to consumers.[6] Plaintiff AT&T was a telecommunications provider that purchased LCD finished products for resale to its customers (national retail chains, authorized sales agents and consumers).[7] All these Plaintiffs admit that their claims are based on the purchase of LCD finished products.[8] And Plaintiffs' experts calculate damages based on purchases of LCD finished products only, not LCD panels.[9] Indeed, the Plaintiffs' expert charged with calculating their "direct purchaser" damages,

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[4] For purposes of this motion only, "panels" includes "modules." Defendants reserve the issue of whether or under what circumstance, a module that incorporates an LCD panel is a separate product or step in distribution for purposes of analysis under *In re ATM Fee* or other authorities.

[5] *See Electrograph Systems, Inc., et al. v. Epson Imaging Device Corp., et al.*, No. 3:10-cv-00117, Dkt. 93, Amended Comp. ("Electrograph Comp.") ¶ 16 (Sept. 23, 2011).

[6] *See, e.g., Best Buy Co., Inc., et al. v. AU Optronics Corp., et al.*, No. 3:10-cv-04572, Dkt. 37, Amended Comp. (Jun. 7, 2011) ("Best Buy Comp.") ¶ 12; *Costco Wholesale Corp. v. AU Optronics Corp., et al.*, No. 3:11-cv-00058, Dkt. 96, Second Amended Comp. (Dec. 23, 2011) ("Costco Comp.") ¶¶ 1, 5; *Target Corp., et al. v. AU Optronics Corp., et al.*, No. 3:10-cv-04945, Dkt. 77, Second Amended Comp. (Sept. 9, 2011) ("Target Comp.") ¶¶ 19, 22, 26, 38, 41.

[7] *See AT&T Mobility LLC, et al. v. AU Optronics Corp., et al.*, No. 3:09-cv-4997, Dkt. 150, Third Amended Comp. (Sept. 9, 2011) ("AT&T Comp.") ¶¶ 1, 73-76.

[8] *See, e.g.*, Declaration of Lee F. Berger in Support of Motion for Partial Summary Judgment for Lack of Standing ("Berger Decl."), Ex. A, Best Buy Plaintiffs' Responses to Defendant LG Display Co., Ltd's First Set of Requests for Admissions No. 6 (Jan. 30, 2012) ("Best Buy is not currently asserting any claim based on its purchase or acquisition of any LCD Panels. Best Buy's claims are limited at this time to those arising from its purchase of LCD Products."); Ex. B, Target Plaintiffs' Responses to LG Display Co., Ltd's First Set of Requests for Admissions No. 6 (Jan. 30, 2012) ("Plaintiffs admit that they did not purchase stand-alone LCD panels during the Conspiracy Period."); Costco Comp. ¶ 1 ("Costco purchased finished products."); Ex. C, Costco Plaintiff's Responses to LG Display Co., Ltd.'s First Set of Requests for Admissions Nos. 4-6 (Dec. 5, 2011) (admitting lack of panel purchases); Ex. D, Electrograph Plaintiffs' Supplemental Responses to LG Display Co., Ltd's First Set of Requests for Admissions No. 6 (Mar. 7, 2012) ("Electrograph admits that its claims are not based on purchases of stand-alone LCD Panels and states that its claims are based on purchases of LCD Products…."); Declaration of Gregory Weingart in Support of Motion for Partial Summary Judgment for Lack of Standing ("Weingart Decl."), Ex. A, AT&T's Responses to LG Display Co., Ltd.'s First Set of Requests for Admission, Nos. 4, 6 (Jan. 30, 2012) ("AT&T admits that it did not purchase standalone LCD Panels during the Relevant Period.").

[9] *See, e.g.*, Berger Decl., Ex. E, at 80, Expert Report of B. Douglas Bernheim, PhD Concerning Best Buy Co. Inc. et al. (Dec. 15, 2011) ("Best Buy Bernheim Opening Report") ("I calculated the total overcharges incurred by [plaintiff] on its purchases of *LCD products* from defendants.") (emphasis added); Berger Decl., Ex. F at 80, Expert Report of B. Douglas Bernheim, PhD

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Dr. Bernheim, expressly relies on his finding that there is a "100% pass-on rate to the dollar-value overcharges for LCD panels" to find that the overcharge on the price-fixed LCD panels was passed on to Plaintiffs when they purchased LCD finished products.[10]

2. Plaintiffs Allege a Conspiracy To Fix the Prices of LCD Panels, Not Finished Products Containing LCD Panels.

Plaintiffs admit that the conspiracy they allege aimed to fix the prices of LCD *panels*, not the prices of LCD finished products. *See* Berger Decl., Ex. I, Electrographs' Obj. & Suppl. Responses to Defs.' First Set of Requests for Admission, at No. 178 (Mar. 8, 2012) ("Electrograph admits that it does not allege that the Conspirators entered into a separate price-fixing conspiracy related to TFT-LCD Finished Products . . . ."); Ex. J, Target Plfs.' Supp. Responses to Defs.' First Set of Requests for Admission, at No. 190 (Mar. 6, 2012) ("Plaintiffs admit that they do not allege that the Conspirators entered into a separate price fixing conspiracy related to LCD Finished Products . . . ."); Ex. K, Costco Wholesale Corp.'s Second Supp. Responses & Objections to Defs.' First Set of Requests for Admission, at Nos. 209-51 (Mar. 2, 2012) ("Costco admits that it has no evidence that the conspirators entered into agreements to fix, raise, or maintain the prices for LCD products themselves."); Ex. L, Letter from Laura Nelson to Chris Wyant, dated Mar. 5, 2012, at 2 (Best Buy "takes the position that the evidence that the Conspirators entered into agreements to fix, raise, or maintain prices of TFT-LCD Panels and that those price increases *affected* the prices of TFT-LCD Finished Products . . . .") (emphasis added);

(continued)
Concerning Overcharges to Costco Wholesale Corporation on Products Containing LCD Panels (Dec. 15, 2011) ("Costco Bernheim Opening Report") (same); Berger Decl., Ex. G at 80, Expert Report of B. Douglas Bernheim, PhD Concerning Electrograph Systems Inc. and Electrograph Technologies Corp. (Dec. 15, 2011) ("Electrograph Bernheim Opening Report") (same); Berger Decl., Ex. H at 80, Expert Report of B. Douglas Bernheim, PhD Concerning Target Corp., Sears, Roebuck and Co., Kmart Corp., Old Comp. Inc., Good Guys Inc., RadioShack Corp. and Newegg Inc. (Dec. 15, 2011) ("Target Bernheim Opening Report") (same); Weingart Decl., Ex. B, at 79, Expert Report of B. Douglas Bernheim, PhD Concerning AT&T Mobility LLC (Dec. 21, 2011) ("AT&T Bernheim Opening Report") (same).

[10] *See, e.g.*, Berger Decl., Ex. E, at 78 ("I computed damages for individual plaintiffs by applying a 100% pass-through rate to the dollar-value overcharges for LCD panels."); Berger Decl., Ex. F, at 78 (same); Berger Decl., Ex. G, at 78 (same); Berger Decl., Ex. H, at 78 (same); Weingart Decl., Ex. B, at 77 (same).

Weingart Decl., Ex. C, AT&T Responses & Objections to Defs.' First Joint Set of Interrogatories, at 49-50 (Jan. 30, 2012) (AT&T contends that "defendants entered into agreements with other Co-conspirators to fix, raise, or maintain the prices of *LCD Panels* at supracompetitive levels," which had the "*corresponding effect* of increasing, to supracompetitive levels, the prices that AT&T paid for LCD products containing the price-fixed LCD Panels.") (emphasis added).

3. During the Relevant Period Most Manufacturers of LCD Panels Did Not Own or Control the Sellers of LCD Finished Products.

Together, Plaintiffs bring Sherman and Clayton Act claims for their LCD finished product purchases from at least 40 suppliers. *See* Berger Decl., ¶25, Ex. X. Although Plaintiffs characterize these purchases as "direct," they have provided virtually no insight into the control relationships they contend entitle them to Clayton Act standing.[11]

For example, Plaintiff Best Buy seeks over eight million dollars in damages for purchases of LCD finished products from Nikon, even though Nikon was never mentioned in Best Buy's complaint or, to the best of Defendants' knowledge, anywhere else in the case. *See* Berger Decl., Ex. E, at 80-81 (Best Buy Bernheim Opening Report). Put differently, Plaintiffs have offered no evidence that Nikon is controlled by an LCD panel manufacturer accused of fixing prices.

This is true across Plaintiffs' cases. All Plaintiffs but Costco bring Clayton Act claims based on purchases of LCD finished products from LG Electronics, for example. *See* Berger Decl., ¶25, Ex. X. But LG Electronics has not made LCD panels since 1998. *See* Berger Decl., Ex. M, Declaration of Joongmoo Byun ¶ 2 (Oct. 6, 2011). And while Plaintiffs argue that they can recover for purchases from LG Electronics based on that company's relationship with LG Display,[12] they admit that LG Electronics has never been a division or subsidiary of LG Display, and that LG Display has never owned a majority share in LG Electronics.[13]

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[11] Costco explicitly included within its "direct purchaser" claims purchases from several entities it claimed fit under the now-discarded *Freeman* "no realistic possibility of suit" standard. Defendants filed a separate motion addressing these easily-disposed of issues before *In re ATM Fee* was issued, Dkt. No. 5979, and do not address those transactions here.

[12] *See, e.g.*, Berger Decl., Ex. N, Target Plaintiffs' Supplemental Responses to Defendant LG Display Co., Ltd's First Set of Interrogatories, at No. 10 (Mar. 13, 2012).

[13] Berger Decl., Ex. B, at Nos. 9, 18; Berger Decl., Ex. O, Electrograph's Objections & (continued)

Plaintiffs' evidentiary failure is particularly stark for purchases from more extended distribution chains. In many instances, even the purported "direct purchasers" are not direct purchasers at all. Original Design Manufacturers ("ODMs") are often the true direct purchasers, having bought the panels from the manufacturers, assembled them into finished products, and sold them to the companies who ultimately sold them to Plaintiffs. *See* Berger Decl., Ex. P, Expert Report of Edward A. Snyder, Ph.D. Regarding Target, et al. ¶ 49 (Feb. 23, 2012).

Indeed, the evidence shows that a large percentage of the finished products sold by Hitachi, Sharp, Samsung, Panasonic, and others, *were in fact manufactured by another company*. *See, e.g.*, Berger Decl. Ex. Q, SECm00093707 (showing that of the approximately 2.3 million LCD Hitachi monitors sold between 2001 and 2006, 725,000 were made by Hitachi, while the rest were made by contract manufacturers or ODMs); Ex. R, SECm00093311 (showing that between 2004 and 2005 AOC assembled televisions for LG Electronics, Mitsubishi, Philips, and others). Plaintiffs have failed to offer any evidence that these ODMs were not the real direct purchasers of Defendants' panels. Further still, as discussed below, the *panels* that were included in the finished products that the ODMs sold to companies like Hitachi and Samsung were often manufactured by someone else. For a large percentage of the LCD finished products composing their claims, Plaintiffs have failed to offer any evidence identifying the manufacturer of the LCD panels those products contain.

4. No Plaintiff Seeking To Pursue Clayton Act Claims for Purchases of LCD Finished Products Has Offered Evidence as to Who Manufactured Each of the Panels in the Products They Seek To Put at Issue.

The finished product manufacturers that sold products to Plaintiffs—including the named Defendants—sourced their panels from a variety of companies. This is equally true for vertically integrated companies and non-vertically integrated companies. At times, the finished product manufacturing divisions of the vertically integrated Defendants incorporated the Defendant's own

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(continued)
Responses to LG Display Co., Ltd.'s First Set of Requests for Admission, at Nos. 9, 18 (Jan. 30, 2012); Berger Decl., Ex. A, at Nos. 9, 18; Berger Decl., Ex. Y, Costco Plaintiff's Supplemental Responses to LG Display's Requests for Admission, at Nos. 10, 18 (Jan. 30, 2012); Weingart Decl. Ex. A, at Nos. 9, 16-17.

panels into their finished products, while at other times they used panels purchased from competitors. *See, e.g.*, Berger Decl., Ex. H (Bernheim Target Report) ¶ 64 ("The evidence I have seen indicates that the vertically integrated defendants . . . often self-supplied LCD panels while simultaneously buying them from and selling them to other firms at market prices."). The vertically integrated Defendants in this case purchased panels both from other Defendants (*e.g.*, LG Display, AUO, and Chi Mei) and from non-defendants. *See, e.g.*, Berger Decl., Ex. S, Expert Rebuttal Report of Leslie H. Marx Concerning Target et al. ¶ 61 (May 11, 2012) ("Data supplied by defendant[] Samsung. . . show numerous LCD products containing LCD panels supplied by companies *other than alleged conspirators*[.]") (emphasis added).

Plaintiffs concede that they cannot identify the company that manufactured the LCD panels in most LCD finished products. *See, e.g.*, Berger Decl., Ex. T, Expert Report of Leslie H. Marx Concerning Target et al. ¶ 72 n.9 (Dec. 15, 2012) ("The data available to me generally did not identify the manufacturers of LCD panels contained in specific LCD products. . . . [A]t least during the Conspiracy Period, only a few suppliers or buyers of LCD products maintained this kind of information in the course of ordinary business."); Weingart Decl. Ex. D, Plaintiff AT&T's Responses and Objections to Defendant Sanyo's First Set of Interrogatories, at No. 16 (Nov. 23, 2011) (AT&T "does not track the source of the LCD Panels incorporated into the LCD Products it purchased in the normal course of business."). No Plaintiff has provided evidence of which company manufactured each of the panels at issue in its claims. Indeed, Dr. Marx was able to identify the panel manufacturer for less than one-quarter of the indirect purchaser LCD finished products analyzed in her report. Berger Decl., Ex. U, Deposition of Leslie H. Marx, at 541:9-25 (June 11, 2012).

IV. STANDARD OF REVIEW

Summary judgment should be entered where, as here, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Although "standing is a question of law for the district court to decide," *In re ATM Fee*, 2012 WL 2855813, at *4 (citing *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)), summary judgment may be granted

where there is no dispute of material fact regarding plaintiffs' claim of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.").

V. ARGUMENT

Based on undisputed facts, this motion seeks summary judgment in Defendants' favor on Plaintiffs' Clayton and Sherman Act claims for their LCD *finished product* purchases. Plaintiffs are "indirect purchasers" who lack standing to bring these claims. Defendants recognize that this Court has covered some of this territory before. Indeed, the scope of the *Illinois Brick* rule was a major focus of the direct purchaser class litigation. Yet, *In re ATM Fee* offers binding guidance to this Court, including respectful disagreement with one of this Court's previous rulings. The Ninth Circuit has now mandated that only direct purchasers *of the price-fixed goods* may pursue claims under the Clayton Act, unless one of the three narrow exceptions applies. Here, none do.

Recognizing *In re ATM Fee* is new authority, Defendants here track the questions the Ninth Circuit raised and resolved in its decision. In so doing, Defendants show that, as in *In re ATM Fee*, "none of the exceptions allow Plaintiffs to avoid 'run[ning] squarely into the *Illinois Brick* wall." 2012 WL 2855813, at *6 (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008)).

A. Plaintiffs Are Indirect Purchasers of LCD Panels.

It is undisputed that these Plaintiffs purchased finished products containing LCD panels and not the panels themselves. *See supra* 10 n.8. Plaintiffs have no evidence of a finished product conspiracy and cannot allege one. *See supra* 11-12. Plaintiffs do claim that Defendants knew that fixing the price of the component panel would *affect* the price of the downstream product. *E.g.*, Berger Decl., Ex. K, at No. 211 ("Costco states that the conspirators entered into agreements to fix, raise, or maintain the prices for LCD panels, which the conspirators *knew* would raise the prices of LCD products.") (emphasis added); Weingart Decl. Ex. C, at 50 (AT&T contends that "defendants entered into agreements with other Co-conspirators to fix, raise, or maintain the prices of *LCD Panels* at supracompetitive levels," which had the "*corresponding*

effect of increasing, to supracompetitive levels, the prices that AT&T paid for LCD products containing the price-fixed LCD Panels.") (emphasis added). These purported grounds for standing are virtually identical to those the Ninth Circuit rejected in *In re ATM Fee*:

> Plaintiffs argue that conspiring to set a price for the purpose and effect of raising the price at issue equates to fixing that price and makes the payers of the raised price direct purchasers.
>
> Plaintiffs' argument misses the mark. *Illinois Brick* rejected this argument when it rejected "mark up" claims.

2012 WL 2855813, at *10. Thus, *In re ATM Fee* makes clear that Defendants' purported knowledge of potential downstream impact is not the test for direct purchaser standing. Whether Plaintiffs paid a price-fixed price is the fact that matters:

> The price paid by plaintiffs must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser under the narrowly defined injury requirement of § 4 of the Clayton Act. Further, under the co-conspirator exception recognized in this circuit, the price paid by the plaintiff must be set by the conspiracy and not merely affected by the setting of another price.

Id. at *11 (citing *Arizona v. Shamrock Foods*, 729 F.2d 1208, 1211 (9th Cir. 1984)). Because Plaintiffs have admitted in discovery that they do not have evidence of a *LCD finished product* conspiracy, their finished product purchases are indirect.

B. No Exception to *Illinois Brick*'s "Direct Purchaser" Rule Applies.

Following the *In re ATM Fee* analysis and having confirmed that Plaintiffs are not direct purchasers, the next question is whether any of the "limited exceptions" allowing indirect purchasers standing apply. *In re ATM Fee*, 2012 WL 2855813, at *6. If not, as in *In re ATM Fee*, Plaintiffs' Clayton Act claims must be dismissed.

1. Plaintiffs Offer No Evidence Raising a Disputed Question of Material Fact that They Can Invoke the Cost-Plus Exception.

Here, as in *In re ATM Fee*, Plaintiffs do not invoke the first recognized exception – the cost-plus contract exception. Plaintiffs do not allege that they had cost-plus contracts with direct purchasers (let alone "preexisting" ones). This exception to *Illinois Brick* does not apply.

2. Plaintiffs Offer No Evidence Raising a Disputed Question of Material Fact Suggesting They Can Invoke the Co-Conspirator Exception.

Plaintiffs have similarly admitted facts that confirm that the co-conspirator exception does not apply. As *In re ATM Fee* clarified, the Ninth Circuit "recognizes the co-conspirator exception *only* when the conspiracy involves setting the price paid by the plaintiffs." 2012 WL 2855813, at *12 (emphasis added). Put slightly differently, "fixing one fee for the purpose and effect of inflating another fee does not make the purchaser a direct purchaser under *Illinois Brick*." *Id.* at *11. Here summary judgment is appropriate because Plaintiffs have no evidence suggesting (let alone raising a disputed question of fact) that they can meet this standard. They have affirmatively conceded that the opposite is in fact true.

Costco and Best Buy are emblematic. Costco admitted that "it has no evidence that the conspirators entered into agreements to fix, raise, or maintain the prices for LCD products themselves." Berger Decl., Ex. K, at No. 211. Best Buy explained that it "takes the position that the evidence that the Conspirators entered into agreements to fix, raise, or maintain prices of TFT-LCD Panels and that those price increases affected the prices of TFT-LCD Finished Products . . . ." Berger Decl., Ex. L, at 2. But *In re ATM Fee* expressly rejects an "affects" or "effect" test. *In re ATM Fee*, 2012 WL 2855813, at *11.

For the exception to apply, "the price paid by a plaintiff must be set by the conspiracy and not merely affected by the setting of another price." *In re ATM Fee*, 2012 WL 2855813, at *11. Having admitted that they cannot meet this standard, Plaintiffs cannot invoke the co-conspirator exception to save their federal LCD finished product claims.

3. Plaintiffs Can Offer No Evidence Raising a Disputed Question of Material Fact on a Product-by-Product Basis that a Specific Alleged Conspirator Both Manufactured the LCD Panel in Their LCD Finished Product and Owned or Controlled the Seller of that Finished Product to the Plaintiff.

Nor can Plaintiffs invoke the "ownership or control" exception to the *Illinois Brick* direct purchaser rule. In *In re ATM Fee*'s wake, this rule is easy to state: "[I]ndirect purchasers may sue [under the Clayton Act] when customers of the direct purchaser own or control the direct purchaser . . . or when a conspiring seller owns or controls the direct purchaser." *In re ATM Fee*,

2012 WL 2855813, at *6.[14] Paralleling *In re ATM Fee*, Plaintiffs' LCD finished product claims do not fall within this exception and must be dismissed for many reasons.

a. Plaintiffs Do Not Have Standing To Assert Claims Based on Purchases of Products Containing Panels Made by Non-Conspirators.

The "ownership and control" test is objective. It looks at the direct purchaser and who owns it. It does not look at the subjective likelihood of who will sue. *In re ATM Fee* cites favorably the admonition that "'[t]he Supreme Court . . . has thus far been indifferent to the question whether the direct purchaser is likely to sue.'" *Id.* (quoting IA Phillip E. Areeda et al., ANTITRUST LAW ¶ 346h (3d ed. 2007)). Instead, the test asks the objective question whether the alleged conspiring seller owns or controls the direct purchaser. *Id.* at *13.

As to finished products containing panels that Plaintiffs do not allege were manufactured by alleged conspiracy participants, this test is dispositive. Even if a conspiracy member purchased such a panel, incorporated it into a product, and then sold that finished product to a Plaintiff, the exception does not apply. Under this scenario, *no one* purchased a price-fixed product, and "a conspiring seller does not own or control the direct purchaser," because the panel manufacturer is not alleged to be a conspiring seller. *Id.* at *6. Defendants' motion should therefore be granted with respect to sales of *any* LCD finished product in which the underlying panel was not manufactured by a party alleged to have participated in the alleged conspiracy.

b. Plaintiffs Do Not Have Standing To Assert Claims Based on Purchases of Finished Products From Companies that Are Not Controlled by Panel-Making Alleged Conspirators.

Following that same reasoning, Defendants' motion should be granted for any of Plaintiffs' finished product claims where the direct purchaser of the incorporated panel was not owned or controlled by an allegedly conspiring LCD panel manufacturer.

As discussed above, many of the direct purchasers of LCD panels were original

[14] Plaintiffs do not allege that *they* own any of the companies who were the true direct purchasers of the LCD panels. Defendants therefore limit their discussion in this section to the second part of the "ownership or control" exception, namely "when a conspiring seller owns or controls the direct purchaser." *Id.*, at *6.

equipment manufacturers ("OEMs"), ODMs, or systems integrators which bought panels from the panel manufacturers and assembled them into finished products. These intermediaries purchased LCD panels but sold LCD finished products; sometimes they sold those finished products to Plaintiffs, and sometimes they sold those finished products into a stream that (with stops along the way) led to Plaintiffs. *See supra* 13. It is undisputed that there were intervening direct purchasers between the LCD panel manufacturers and the Plaintiffs. This reality precludes Plaintiffs from relying on the "ownership or control" exception for many of their LCD finished product claims. Plaintiffs can offer no evidence that a defendant or alleged co-conspirator controlled these OEMs, ODMs, or systems integrators, and thus the Court should dismiss all of Plaintiffs' finished product claims where an independent company was the direct purchaser of the TFT-LCD panel.

This is true even where Plaintiffs claim that the direct purchasers had some affiliation with a defendant or alleged co-conspirator. "Affiliation" is not the test. Ownership and control by the alleged conspirator is. *In re ATM Fee*, 2012 WL 2855813, at *13; *id.* at *12 (referring to test as "parental control"). For example, some Plaintiffs include indirect purchases from LG Electronics in quantifying the claims they are pursuing under the Clayton Act. *See, e.g.*, Weingart Decl. Ex. B ¶ 12. Under *In re ATM Fee*, these claims must also be dismissed. Plaintiffs offer no evidence that LG Display owned or controlled LG Electronics. *See supra* 12. Or take Nikon, which Best Buy claims to be the source of "direct" purchases. *See supra* 12. Best Buy does not allege and has no evidence that Nikon participated in the alleged conspiracy, nor does it have any evidence that a company that did participate in the alleged conspiracy owned or controlled Nikon. Nor could it. Control "means to exercise restraint or direction over . . . or to have the power or authority to guide or manage." *Id.* at *14. This means a Plaintiff who claims one company controlled another "must prove it," and "[s]tock ownership alone, at least when it amounts to less than a majority, is not sufficient proof of domination or control." *Id.* (quoting *Kaplan v. Centex Corp.*, 284 A.2d 119, 122-23 (Del. Ch. 1971)).

Here, Plaintiffs can point to no evidence suggesting they can meet these proof standards as to LG Electronics, Nikon, or many of the other companies from whom they allege they purchased

finished products.[15] For these reasons, the Court should dismiss all of Plaintiffs' Clayton Act claims where the direct purchaser of the incorporated LCD panel was not owned or controlled by an allegedly conspiring manufacturer.

c. Plaintiffs Do Not Have Standing To Assert Claims Based on LCD Finished Product Purchases Where Different Alleged Conspirators Manufactured the LCD Panel and the LCD Finished Product.

Next, because of a similar lack of parental ownership or control by a co-conspirator, *In re ATM Fee* also requires dismissal where a Plaintiff purchased a LCD finished product manufactured by one defendant or alleged co-conspirator but which incorporated a LCD panel manufactured by a different defendant or alleged co-conspirator. For example, consider instances in which defendant Chimei Innolux Corporation (f/k/a Chie Mei Optoelectronics Corporation) sold a television panel to defendant Sharp Corporation.[16] Chimei Innolux and Sharp are both publicly held companies, and hence are not under common ownership or control. There has never been any allegation that Chimei Innolux owns or controls Sharp. Thus, where Chimei Innolux sold a LCD panel to Sharp, the exception does not apply, because the "ownership or control" *does not* extend "to situations where the seller does not own or control the direct purchaser." *In re ATM Fee*, 2012 WL 2855813 at *13. This is true across a broad swath of Plaintiffs' claims. AUO sold television panels to Mitsubishi and Philips and countless others; LG Display sold monitor panels to, among others, NEC and LG Electronics. *See* Berger Decl., Exs. Q & R. To

[15] LG Electronics and Best Buy are not the only examples. Plaintiffs include in their Clayton Act damages claims finished product purchases from Tatung without any evidence that the direct purchaser of the panel underlying these products was "owned or controlled" by a defendant or co-conspirator. These examples are admittedly not exhaustive. Plaintiffs assert their federal damage claims based on LCD finished product purchases from more than 40 companies. Berger Decl. ¶ 25 & Exhibit X. Plaintiffs, however, have never identified which specific exception they believe permits their indirect claims to proceed under the Clayton Act despite *Illinois Brick*'s "direct purchaser rule." *See In re ATM Fee*, 2012 WL 2855813, at *4 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof[.]") (quotations omitted). As the First Circuit explained in another context, *Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir. 2007), "[i]t is plaintiffs' burden to establish injury-in-fact as an essential part of their standing—not [defendant's] burden to disprove it." *Id*. at 29.

[16] *See, e.g.*, Berger Decl., Ex. V, Deposition of Masahiro Yokota (Sharp Electronics Corp.), 109:5-12 (Mar. 11, 2009) ("Q: Did Sharp Corp have occasion to purchase panels or modules from other manufacturers for use in any of the LCD products we have been talking about? A: Yes, we have. Q: And from what manufacturers? A: The manufacturers, such as AUO or CMO.").

the extent Plaintiffs assert claims based on their purchases of LCD finished products incorporating panels made by a manufacturer that does not own or control the LCD finished product seller, on its face *In re ATM Fee* bars their claims.

In re ATM Fee could not be more explicit about this result. There, plaintiffs alleged that defendant banks fixed the interchange fee paid by ATM owners (including some of the same defendant banks), which was then passed on to the plaintiffs (by some of the same defendant banks) in the form of a foreign ATM fee. *In re ATM Fee*, 2012 WL 2855813, at *2. Plaintiffs argued that under *Royal Printing*, the fact that there were different defendants on both sides of the direct transaction meant that an exception should apply, and they should be allowed to sue despite being only indirect purchasers. *Id.* at *13. The Ninth Circuit disagreed, confirming that *Royal Printing* does not reach that far: "[T]here are no allegations that Bank Defendants controlled one another or conspired to fix foreign ATM fees [the price paid by the plaintiffs]. As such, the concern in *Royal Printing* of a controlling party prohibiting the direct purchasers from suing is not present here." *Id.* at *14, n.10. Control is the only test, and because the defendant banks did not control each other under the "control" standards the Ninth Circuit articulated in *In re ATM Fee*, *see supra* 17-18, the *Royal Printing* exception did not apply even though defendants were alleged co-conspirators.

So too here. For example, there are no allegations that the panel-manufacturing Defendants controlled one another under those stringent standards or conspired to fix finished product prices. There is no evidence that Chi Mei controls Sharp. There is no evidence that AUO controls Philips. There is no evidence that LG Display controls NEC. Because the Ninth Circuit refused "to extend the exception noted in *Royal Printing* and *Freeman* to situations where the seller does not own or control the direct purchasers [who sold to plaintiffs]," *id.* at 13, this Court should grant Defendants' motion for summary judgment on all claims where Plaintiffs (i) purchased a LCD finished product manufactured by one Defendant or alleged co-conspirator but which incorporated a LCD panel manufactured by a different Defendant or alleged co-conspirator or (ii) where an ODM or systems integrator was the actual direct purchaser.

d. Plaintiffs Have No Evidence To Prove Clayton Act Standing For Any Individual LCD Finished Product Purchase.

As *In re ATM Fee* makes clear, Plaintiffs do not have standing under the Clayton Act to bring claims for indirect purchases unless they satisfy one of the three limited exceptions to *Illinois Brick*. *Id.* at *11. Exceptions are evaluated on a purchase-by-purchase basis; the fact that a plaintiff might have standing under *Illinois Brick* for some purchases does not allow the plaintiff to bootstrap standing for claims that *Illinois Brick* bars. *See Royal Printing*, 621 F.2d at 327–28 (holding that plaintiffs could only recover for the *specific purchases* from entities that were owned by co-conspirators; claims based on purchases from direct purchasers *not* owned by a co-conspirator were barred under *Illinois Brick*); *see also Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1180–82 (N.D. Cal. 2009) (holding that plaintiff failed to present a material dispute of fact as to whether certain indirect purchases fell within the control exception to *Illinois Brick*).

Plaintiffs offer no way to determine whether the LCD finished products that they purchased—even from allegedly "controlled" subsidiaries—contain panels made by the allegedly controlling parent conspirators. To be sure, as to Plaintiffs' supposed "direct" purchases of finished products, Plaintiffs' expert Dr. Marx studies a few examples of purchases and determines that there are "numerous LCD products [that] contain LCD panels supplied by companies other than alleged conspirators," but she does not try to show which "direct" purchases contain alleged-conspirator panels, let alone try to identify those purchases containing panels made by a controlling alleged conspirator. Berger Decl., Ex. S ¶¶ 61-62. As to Plaintiffs' acknowledged indirect purchases—those for which Plaintiffs do not seek Clayton Act standing—Dr. Marx tries to identify which of Plaintiffs' purchases of finished products contain a conspirator-made panel and which do not. *Id.* ¶ 63. But even this task is challenging because "[t]he data available . . . generally did not identify the manufacturers of LCD panels contained in specific LCD products." *Id.* ¶ 72 n.9. Accordingly, Dr. Marx was able to identify the panel manufacturer in fewer than 25% of the products she studied. *See* Berger Decl. Ex. U, at 558:9-559:14. Further, Dr. Marx makes *no* effort to account for ODMs and systems integrators as intermediaries between the panel

maker and the LCD finished product maker. And in any event, this exercise cannot support Plaintiffs' burden here, because Dr. Marx's identification analysis does not concern the LCD finished product purchases for which Plaintiffs seek Clayton Act standing, and does not look at any other question besides whether the panel was made by an alleged conspirator or not.

4. *In re ATM Fee* Precludes Recognizing New Exceptions.

As established above, *supra* at n.1, the over-arching instruction from the Ninth Circuit in *In re ATM Fee* is that the few exceptions to *Illinois Brick*'s "direct purchaser rule" are to be interpreted narrowly and courts should refuse to recognize new exceptions where the Supreme Court has not done so. For example, the Ninth Circuit rejected this Court's reliance on *In re Linerboard*, 305 F.3d 145, 158-60 (3d Cir. 2002) in a prior *TFT-LCD* decision, because decisions such as *Linerboard* "restrict *Illinois Brick's* influence by allowing an exception when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to the plaintiffs." *In re ATM Fee*, 2012 WL 2855813 at *12, n.7. This "contradicts the Supreme Court's admonition 'not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.'" *Id.* (quoting *UtiliCorp*, 497 U.S. at 216 (quoting *Illinois Brick*, 431 U.S. at 744)). Elsewhere, *In re ATM Fee*, again citing *UtiliCorp*, rejected expanding *Royal Printing*'s "ownership and control" test, because to do so would "undermine the [direct purchaser] rule." *Id.* at *13.

Distinct from the arguments above, this *In re ATM Fee* admonition—no new exceptions—further confirms why Plaintiffs' LCD finished product claims should be dismissed. Setting everything else aside, the basic point is this: Plaintiffs did not buy the allegedly price-fixed good, a panel. They bought finished products in which such panels were one component among many. No Ninth Circuit case allows an indirect purchaser to sue under the Clayton Act in these circumstances—where the product purchased is different from the price-fixed good.[17] A new exception would be required, and the law does not permit new exceptions.

[17] In *Royal Printing*, for example, the same product (paper) passed through several sets of hands. *Royal Printing*, 621 F.2d at 324.

Judge Legge, sitting as Special Master in the *CRT* litigation, reached a similar conclusion. Disagreeing with this Court's pre-*In re ATM Fee* analysis, Judge Legge recommended that Judge Conti dismiss *all* direct purchaser claims founded on finished product purchases. *See* Report & Recommendation, *In re Cathode Ray Antitrust Litig.*, No. 07-5944, D.I. 1221 (N.D. Cal. May 31, 2012) (objection pending). As he explained: "The plaintiffs against whom this motion is directed did not purchase any price-fixed product, *i.e.*, a CRT, from anyone. They purchased, at best, a manufactured product which contained a CRT. Therefore, even the cases which have found some exception to *Illinois Brick* cannot apply in this case, because plaintiffs did not purchase a price-fixed product." *Id.* at *12 (emphasis in original).

Thus, while *In re ATM Fee* compels the dismissal of Plaintiffs' finished product claims for all of the reasons stated above, it equally compels the dismissal of their finished product claims for the mere fact that they are finished product claims. No existing Ninth Circuit exception sanctions allowing Plaintiffs to pursue Clayton Act claims based on their downstream LCD finished product purchases when they only claim to have evidence of a LCD panel conspiracy.

VI. CONCLUSION

The Ninth Circuit's holding in *In re ATM Fee* means that Plaintiffs lack standing to pursue federal claims for their LCD finished product purchases. Plaintiffs are indisputably indirect purchasers. Not one of the three narrow exceptions to *Illinois Brick's* strict "direct purchaser rule" apply to their purchases. Each is free to pursue claims based on their indirect purchases under state law (if applicable and subject to all Defendants' defenses). Their federal claims, however, must be dismissed.

Respectfully submitted,

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Attestation: The filer of this document attests that the concurrence of the signatories thereto has been obtained.